Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ALBERT L. LASSITER, Petitioner,

v.

JANET RENO,
United States Attorney General;
EDUARDO GONZALEZ,
Director, United States Marshal Service;
HELEN F. FAHEY,
United States Attorney;
U.S. MARSHAL SERVICE, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Rehabilitation Act of 1973 require that the Government prove that a disabled employee with a handicap pose a reasonable probability of substantial harm either to himself and others before it can terminate the employee due to his disability where the examining physicians state that no such reasonable probability of harm exists?

II. Is a federal agency required to offer job reassignment or other alternative to termination to a handicapped employee where such vacancies exist and job reassignment is required by Agency and Federal personnel policies?

III. Did the Appellate Court improperly apply the standards for granting summary judgment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Albert L. Lassiter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 29, 1996. The petition for rehearing and rehearing en banc was denied on July 26, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decision of the United States District Court for the Eastern District of Virginia has not been reported. It is reprinted in the appendix hereto, p. 14a, infra.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. §§791, 794 and 28 U.S.C. §1331, the Petitioner brought this suit in the United States District Court for the Eastern District of Virginia, Richmond Division. On May 15, 1995, the Eastern District granted summary judgment and dismissed the Petitioner's complaint.

On Petitioner's appeal, the United States Court of Appeals for the Fourth Circuit on May 29, 1996, affirmed the decision of the Eastern District of Virginia and dismissed the Petitioner's complaint.

Petitioner filed a Petition for Rehearing and Rehearing en banc which the Fourth Circuit Court of Appeals denied on July 26, 1996.

The jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

29 U.S.C. §794 which provides, in part, that no qualified individual with handicaps in the United States, as defined in section 7(8) (29 U.S.C.S. §706(8)), shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

STATEMENT OF THE CASE

Albert L. Lassiter became employed with the United States Marshal Service ("Agency" or "USMS") on January 12, 1970 and became a full-time Deputy United States Marshal ("DUSM") on June 27, 1971. Lassiter has consistently received performance ratings in the excellent to superior rating from the Agency.

Lassiter was voluntarily hospitalized at Charter Westbrook Hospital in Richmond, Virginia from December 24, 1990 until January 17, 1991. The discharge summary from Charter Westbrook Hospital in Richmond, Virginia indicated that his final diagnosis was "paranoid disorder, acute, rule out brief reactive psychosis, paranoid personality disorder."

The regulations of the USMS require that an employee with a permanent physical disability be entitled to reassignment. The USMS Service Manual states that employees who have "serious, permanent physical disabilities" are entitled to reassignment.

The USMS cannot terminate an employee merely because it believes that the employee's medical condition might worsen in the future:

> The Federal Personnel Manual requires that the agency must find a direct relationship between the disqualifying condition and the essential duties of the specific position to be filled. In other words, the fact that an individual has a medical condition which might become worse is not enough by itself to support disqualification. The agency must establish either a link between the condition and inability to perform, or a high probability of hazard because of the nature of the duties, should the person be placed in the position. (See Federal Personnel Manual, Section 339-A-1.) (App. p. 42a).

On January 30, 1991, the Agency referred Lassiter for a fitness for duty examination. The psychiatrist chosen for this examination was unable to conduct the examination, so Dr. Thomas A. Mathews, another psychiatrist who had never conducted a USMS fit for duty, conducted the examination. Dr. Mathews' initial report dated March 4, 1991 diagnosed Lassiter as having a delusional (paranoid) disorder. He indicated that he did not see a problem with Lassiter's continued employment, but recommended that Lassiter's firearm be confiscated.

After Lassiter received a copy of Dr. Mathews' report, he was examined by a number of psychiatrists and psychologists, including Dr. Melvin J. Stern, M.D., Dr. Paul Travis, M.D. and Dr. David G. Daniel, a world-renouned expert in the area of delusions. Lassiter also underwent a

series of psychological tests administered by Dr. Juliann W. Hanback. The reports of these doctors confirmed that although Lassiter was experiencing the symptoms of a paranoid personality disorder, they uniformly found that Lassiter continued to be able to perform the duties of a DUSM, including the carrying of a firearm in spite of this condition.

Dr. Stern made the following findings regarding Lassiter's mental condition:

> During my psychiatric examination of Mr. Lassiter, I saw no evidence that he was suffering from an affective or though disorder. That is, he showed no evidence for depression or mania; he was not delusional; nor did he have a speech disorder characterized by loosening of associations, flight of ideas or tangentiality. He was cooperative throughout our sessions and provided all the information requested. (App. p. 30a).

With regard to Lassiter's ability to continue his employment with the USMS, Dr. Stern stated that he believed that Lassiter was not presently dangerous and should be permitted to return to work and carry a firearm. Dr. Stern recalled a discussion he had with Dr. Mathews concerning Lassiter's condition:

> Then I said to him, "Did you think there's a reasonable probability based, Dr. Mathews on your belief that Lassiter was delusional, that Lassiter will commit some violent act?" And Mathews' answer was no.

Dr. David G. Daniel, M.D. concurred with Dr. Stern's assessment regarding Lassiter's continued capacity to carry a firearm:

> The preponderance of historical, cross-sectional and expert opinion evidence in this case support the view that Mr. Lassiter suffers from a paranoid personality disorder and has a very low potential for impulsive violence. (App. p. 34a).

Dr. Paul Travis, M.D. also reported that he believed that Lassiter was not dangerous:

> The longstanding history is indicative of a personality disorder yet, it has not impaired his abilities to perform his duties as a D.U.S.M. and he has never used deadly force. (App. p. 44a).

Lassiter had always performed his duties as a DUSM in at least an excellent to outstanding manner as evidenced by his performance appraisals. The Agency had no other grounds for his termination other than his disability which is considered a paranoid personality disorder. a paranoid character disorder.

On January 21, 1991, Lassiter received notification from the Agency that his USMS periodic medical examination taken November 1, 1990 was essentially "normal". In his later conversations with the Agency and in his testimony, Dr. Mathews was not able to quantify his belief that a person diagnosed with a delusional paranoid disorder has a "reasonable likelihood" of being dangerous. (App. p. 35a).

Dr. Mathews testified that the final discharge diagnosis from a hospital is the most important diagnosis. Westbrook Hospital's final discharge diagnosis stated that Lassiter was suffering from "acute paranoid disorder ... paranoid personality disorder."

Dr. Mathews testified that there was not a "reasonable likelihood" that Lassiter might become violent, only a "possibility:"

> Question: Do you believe there is a reasonable likelihood that Mr. Lassiter will become violent, and therefore should not carry a weapon?
>
> Answer: If you ask me "likely", the answer is no; "possibly", the answer is yes. (App. p. 35a).

During the Agency's consideration of Lassiter's continued job status, the Agency was unsure of its obligations regarding the "reasonable accommodation" of a handicapped individual such as Lassiter. Thomas Mulhern, Regulations Officer for the USMS, requested that Ms. Dene James, his administrative assistant, research the USMS obligation to "reasonably accommodate" Lassiter's disability. Mulhern directed James to "look at other types of job prospects for Mr. Lassiter that would conform to the reasonable accommodation requirements. James reviewed job vacancies on a national level as well as a local level. The Agency determined that Lassiter could serve as a physical security specialist and as a property management specialist. (App. p. 45a).

Kenneth Holecko, Assistant Director for Human Resources for the USMS, stated that the USMS now routinely considers an assignment of a handicapped employee to some administrative position for which the employee is qualified.

Holecko drafted a letter to Lassiter stating that his job reassignment from Richmond to Alexandria, Virginia had been approved. At the time of Lassiter's termination, there were vacancies in non-operational positions at the USMS. Holecko testified that the USMS determined that Lassiter could have met its basic qualifications for an administrative position.

With regard to "reasonable accommodation," the Federal Personnel Manual states that agencies "are also required to consider reassignment as one method of according reasonable accommodation to a qualified handicapped employee." (App. p. 41a).

After Dr. Mathews reviewed the psychiatric reports of Drs. Stern, Travis and the psychological reports of Dr. Hanback, Dr. Mathews made the following recommendation to the USMS regarding Lassiter's ability to remain a DUSM:

1) Return him to work with regular psychiatric counseling.

2) Return him to work and make him submit to random unannounced psychiatric examinations.

3) Send him to another doctor for review. (App. p. 29a).

Although James stated that Lassiter was not offered an administrative position because there were no positions available nationwide. She stated that it was likely that a position may have come open in the future. James prepared a letter for Mead which acknowledged that Lassiter was qualified for two property management specialist positions and Mead was willing to assign Lassiter to either position. (App. p. 37a). Mead also prepared a letter to Lassiter indicating that he would be reassigned to administrative positions within the Service in Atlanta, Georgia and Houston, Texas for which he was qualified.

Mead acknowledged in the past that the USMS had transferred employees to other positions due to their disability. The USMS determined that Lassiter was qualified for a Property Management Specialist at GS-11 level. A letter was prepared by the USMS offering Lassiter such a position. Another draft letter was prepared offering Lassiter the position of Administrative Service Specialist, GS-11, Eastern District of Virginia, but these letters were never sent to Lassiter. (App. p. 36a).

The USMS also provides an Employee Assistance Program to employees whose behavioral problem may result in impaired job performance and maintains an Affirmative Action Program for individuals with disabilities. The USMS Handicapped Hiring Program provides yet another avenue for the retention by the USMS of employees who have a disability including a mental impairment. These options were never offered to Lassiter.

REASONS FOR GRANTING THE WRIT

I. THE REHABILITATIONAL ACT OF 1973 (29 U.S.C. 794) REQUIRES THAT THE GOVERNMENT PROVE THAT A DISABLED EMPLOYEE WITH A HANDICAP POSE A REASONABLE PROBABILITY OF SUBSTANTIAL HARM EITHER TO HIMSELF AND OTHERS BEFORE IT CAN TERMINATE THE EMPLOYEE DUE TO HIS DISABILITY WHERE THE EXAMINING PHYSICIANS STATE THAT NO SUCH PROBABILITY EXISTS.

Congress enacted the Rehabilitation Act of 1973 to require that the Federal Government to act as a model employer of handicapped persons and take affirmative action to hire and promote qualified mentally and physically handicapped persons. (29 C.F.R. § 1613.703). No federal agency may discriminate on the basis of an employee's disability. Congress passed this Act for the express purpose of "promoting and expanding employment opportunities in the public and private sectors for handicapped individuals." See, 29 U.S.C. §701(8).

The Rehabilitation Act of 1973 also requires that federal agencies do more than just submit affirmative action plans, it imposes "a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion." See, Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981).

In the employment context, this term "otherwise qualified" has been held to mean that the handicapped

employees can perform the essential function of the job "either with or without the need for accommodation or with a reasonable accommodation." See, School Board of Nassau County, Florida v. Arline, 480 U.S. 273; Southeastern Community College v. Davis, 442 U.S. 397, 406; Gilbert v. Frank, 949 F.2d 637, 642 (CA2, 1991); Jasany v. United States Postal Service, 755 F.2d 1244, 1251 (CA6, 1985); Brennan v. Stewart, 834 F.2d 1248, 1261-1262 (CA5, 1988); Chandler v. City of Dallas, 2 F.3d 1385 (CA5, 1993), Fedro v. Reno, 21 F.3d 1391 (CA7, 1994); Bradley v. University of Texas M.D. Anderson Cancer Center, 3 F.3d 922 (CA5, 1993), cert den 127 L.Ed 2d 389, 114 S. Ct. 1071 (1994); Buckingham v. United States, 998 F.2d 735, 740 (CA9, 1993).

The question of whether Petitioner is a "qualified handicapped person" within the purview of the Rehabilitation Act and can perform the essential functions of this position "with or without reasonable accommodations" is a critical issue of fact that should have been resolved at trial by the trier of fact and should have not been considered upon a motion for summary judgment since the differing opinions of the examining physicians concerning Petitioner's ability to perform the duties of DUSM. See Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994); 29 CFR §1614, 203 (a)(6).

The Court of Appeals adopted a medical standard for disqualification that has no definition under its own Regulations and in medical terminology. Both Dr. Stern and Dr. Hanback have no knowledge of the definition of "Basic Personality Disorder." This term is not defined by the USMS in its medical standards for fitness for duty which require that the DUSM has "no history of a basic personality disorder." However, the Court of Appeals has incorrectly adopted this standard rather than the standard as stated in Mantolete v.

Bolger, 767 F.2d 1416 (9th Cir. 1985), that "the employee cannot perform his duties without a reasonable probability of substantial harm to himself or others." By adopting the incorrect standard, the Court of Appeals has subverted the rights of employees with a disability to maintain their jobs in the workplace.

In this case, the Court of Appeals for the Fourth Circuit has put forth its own test for evaluation of a handicapped person's ability to perform the essential functions of their job which is in clear conflict with the similar decision of the Ninth Circuit Court of Appeals in Mantolete, supra. The holding in this case has been uniformly recognized to be the applicable test for determining whether or not a federal employee's disability prevents he or she from performing their job with or without reasonable accommodation. The Government has conceded that Mantolete, supra sets forth the applicable test for the requirement that Petitioner's disability must present to the USMS "a reasonable probability of substantial harm to himself or others." However, the Fourth Circuit has declined to follow the holding in Mantolete, supra and instead has made factual conclusions of "dangerousness" in spite of the factual opinions of the examining physicians in this case and contrary to the holdng of this Court in School Board of Nassau County, Florida v. Arline, 480 U.S. 213, 287 n.17 (1987) and the Ninth Circuit in Mantolete, supra. The conflict between the test set forth in Mantolete, supra and the Fourth Circuit test in this case cannot be more complete and cannot be justified by the record in this case.

The Fourth Circuit opinion in this case gives only lip-service to this Court's holding in Arline, supra. Arline unequivocally holds that the Court must made an individualized inquiry and make appropriate findings of fact

concerning, in this case, the severity of the risk and the probabilities of the risk to others. The Fourth Circuit's comparison of Petitioner's disability to some theoretical "risk" to others which has been determined by Petitioner's examining medical experts to not only be improbable, but practically non-existent based upon their extensive examination and psychological testing of Petitioner.

This Court in Arline held that courts should defer to the reasonable medical judgment of public health officials. This Court has not yet taken the opportunity to address the standard by which courts should also defer to the reasonable medical judgment of private physicians in disability cases. See Arline, supra at note 18. Granting the petition in this case would give this Court the opportunity to rule whether or not deference should be given to the reasonable medical judgment of private physicians, as well as public health officials. The Fourth Circuit has confused this Court's holding in Arline in its convoluted effort to justify its conclusion that Petitioner's exemplary service as DUSM must be sacrificed in order to keep Petitioner from handling a firearm in spite of the clear evidence that Petitioner can safely and objectively perform all the essential duties of a DUSM, including carrying a firearm. Such a holding would have great precedence in all cases involving disability determinations, including ERISA (29 U.S.C. 1001, et seq.).

The Fourth Circuit's desire not to substitute its judgment for that of the USMS in this case unquestionably flies in the face of its duty under §504 of the Rehabilitation Act to carry forth Congress' recognized requirement that the this Act, as well as the Americans with Disability Act (42 U.S.C. 12111) was enacted to protect handicapped persons from discrimination based upon their handicap and requires an "individualized" assessment of Petitioner's condition.

Under the Americans with Disability Act, the term "direct threat" has been defined as a significant risk to the health and safety of the individual and others that cannot be eliminated by reasonable accommodation. 42 U.S.C. 12111; 56 C.F.R. 35734, 35736 (1991).

In determining the ability a handicapped employee to perform the essential job functions of his job, the agency or employee must make an individualized assessment of the "reasonable likelihood" of future dangerousness. Instead, the Fourth Circuit Court of Appeals has simply deferred to the opinion of the Agency which has been shown to be clearly flawed based not only on the opinions of Petitioner's examining physicians, but also by the Agency's own internal documentation which undermines the testimony of Dr. Mathews, the physician employed by the Government to conduct the fitness for duty examination of Petitioner. His testimony is the linchpin of the Government's claim that Petitioner poses a "reasonable probability of substantial harm." However, the Agency's own internal documents and his testimony at the MSPB hearing clearly demonstrate that Mathews did not believe that Petitioner's condition posed any such threat to either himself or others.

This case will provide this Court with an opportunity to give guidance to the lower courts as to the requirements of both the Rehabilitation Act of 1979 and the Americans with Disability Act of 1990 (42 U.S.C. 1211) that the employer cannot discharge handicapped employees with mental disabilities without solid proof that the employee's continued job performance posses a substantial threat to the safety of the work plan.

Therefore, this Court should grant Petitioner's writ for certiorari in order to resolve the conflict between the Fourth

Circuit and the Ninth Circuit regarding the proper test for determining the right of disabled employees to be employed despite their disability and also to give guidance to lower federal courts an order to preserve the rights of handicapped American employees.

II. THIS COURT MUST CLEARLY EXPLAIN THAT MEANING OF REASONABLE ACCOMMODATION UNDER THE ACT INCLUDES JOB REASSIGNMENT WHERE APPROPRIATE.

In this case, the Fourth Circuit has held that the USMS had no duty to reassign the Petitioner to another job assignment or otherwise accommodate his disability. Once again, the Fourth Circuit ignored the Court's holding in Arline, supra at p. 1131 note 19 where it speaks about "alternative employment opportunities reasonably available under the employer's existing policies." The Fourth Circuit's holding is also clearly in conflict with the holding of the District of Columbia Court of Appeals in Doe v. Hampton, 566 F.2d 265 (D.C. Co. 1977) and its own decision in Gullot v. Garrett, 970 F.2d 1320(4th Cir. 1992). The record in this case clearly demonstrates that the federal government maintains numerous employment policies regarding employment of the handicapped clearly mandates that some effort must be made by the federal government to accommodate a disability, even if it requires medical supervision or job reassignment if provided for in agency rules regulation. Petitioner has pointed out numerous federal and specifically USMS regulations which would have provided viable alternatives to Petitioner's termination. However, the Fourth Circuit countenanced the refusal of the USMS to provide Petitioner with any alternative to

termination in spite of Petitioner's avid willingness to relocate at the request of the USMS to several jobs for which the USMS admits he was qualified or provide some other alternatives to termination such as extended leave or employee assistance.

Several lower courts have held that where it is a regular practice of the employer to transfer employees between facilities, an employer is required to offer such a transfer to another facility as a reasonable accommodation. Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995); Valdez v. Albuquerque Public Schools, 875 F. Supp. 740 (D. NM 1994). In addition, reassignment has been held to be appropriate in a number of federal agency decision. See, Santos v. USPS, EEOC 0911380 (1991); McQueen v. Dept. of Justice, 53 MSPR 530 (1992); Savage v. Dept. of Navy, 36 MSPR 148 (1988); Brown v. Dept. of Navy, 53 MSPR 537 (1992). The question of job reassignment where it can be shown that a vacancy exists and the employee is qualified to perform that job should never be ruled out because it is a protection guaranted to qualified employees with a disability under the Act.

The Fourth Circuit's decision in this case clearly disregards the USMS policy of utilizing reassignment as a tool in determining "reasonable accommodation" and is in conflict with the decision in Burlington v. U.S., 998 F.2d 735 (9th Cir. 1993) and Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994) which provide that the Government must abide by its own policies in determining reasonable accommodation even if those policies include reassignment. Petitioner also requested other forms of accommodation short of reassignment which were summarily rejected by the Fourth Circuit in its opinion.

The Fourth Circuit's opinion will create confusion in the lower courts concerning the scope of "reasonable accommodation because its decision upholds an agency determination that no reasonable accommodation is ever required even it if its proven that alternatives to termination indisputably exist and are consistent and in compliance with Agency rules and federal personnel policies. Government employees need to be reassured by this Court that their jobs are secure even if they divulge a handicap which prevents them from performing the job to which they are currently assigned.

This case will give this Court an opportunity to provide much-needed guidance to have courts on the scope of "reasonable accommodation" even if it means job reassignment if such alternative is consistent with agency policy.

The USMS did not know its obligation for "reasonable accommodation" in instances where it determined that an employee was no longer able to perform the function of his job due to his disability. This court must take the opportunity to provide guidance to both public and private employers on the scope of reasonable accommodation to resolve differing interpretations of this requirement under the law.

III. THE LOWER FEDERAL COURTS HAVE MISAPPLIED THIS COURT'S REQUIREMENTS FOR THE GRANTING OF SUMMARY JUDGMENT.

Rule 56(c) of the Federal Rules of Civil Procedure requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on

which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548-53, 91 L.Ed.2d 265 (1986). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." Haas v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985), cert. denied, 474 U.S. 981, 106 S.Ct. 386, 88 L.Ed. 2d 338 (1985). In ruling on a motion for summary judgment, a federal court must view all facts in a light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989); United States v. Diebold, Inc., 359 U.S. 654 (1962); Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797 (5th Cir. 1993).

The inferences and diagnosis of the nature and extent of Petitioner's mental condition were clearly at issue based upon the views by Drs. Mathews, Travis, Stern, Hanback and Daniel. Drs. Stern, Daniel and Travis all stated that Petitioner has a paranoid personality disorder which does not interfere with his ability to perform all the duties of a Deputy United States Marshal, including, carrying a firearm. Both psychiatrists agree that Petitioner is not "delusional" and has never suffered from delusional thoughts. They agree that Lassiter is able to remain employed as a Deputy United States Marshal in an operational position.

To the contrary, Dr. Mathews has stated that Petitioner had suffered from a "delusional" paranoid personality disorder. However, he has admitted that Lassiter does not pose a "reasonable likelihood of substantial harm" if he continues to possess a firearm. Otherwise, all four

psychiatrists agree that Lassiter is fully able to perform all the duties of his office.

While this Court held in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) that the Court may grant summary judgment if "there is no genuine issue of material fact," the dispute in this case centers around the medical opinions concerning the impact of Petitioner's psychological disorder on his ability to perform his duties of a DUSM which include carrying a firearm. However, this Court also countered that "the judges' function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson supra at p. 219.

However, the District Court and the appellate court have clearly manifested a readiness to grant summary judgment that was not authorized by this Court. The courts have increasingly showed for greater deference to the moving party in its ruling on summary judgment that on the non-moving party whose evidence is entitled to all reasonable inferences. See U.S. v. Diebold, Inc., supra.

In this case, the lower federal courts have misinterpreted this Court's direction on the proper use of summary judgment under Rule 56(c) because the difference of medical opinions regarding Lassiter's ability to carry a firearm is undoubtedly a material fact regarding the grounds for his termination. If the jury were to believe Drs. Stern, Hanback, Travis & Daniel, then they must conclude that Petitioner could perform all the duties of a DUSM, including the carrying of a firearm. This is not a metaphysical doubt, but demonstrates that summary judgment was clearly inappropriate in this case.

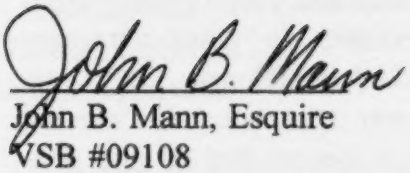
This Court should grant Petitioner consideration to these issues in order to guide lower federal courts on the proper use of the award of summary judgment.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

ALBERT L. LASSITER



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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ALBERT LASSITER,
Plaintiff-Appellant,
v.
JANET RENO, United States Attorney General; EDUARDO GONZALEZ, Director, United States Marshal Service; HELEN F. FAHEY, United States Attorney; U.S. MARSHAL SERVICE,
Defendants-Appellees.

No. 95-2058

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-94-626)

Argued: March 6, 1996

Decided: May 29, 1996

Before RUSSELL, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Bertram Mann, LEVIT & MANN, Richmond, Virginia, for Appellant. Nicholas S. Altimari, Assistant United States Attorney, Richmond, Virginia, for Appellee. **ON BRIEF:** Helen F. Fahey, United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Albert L. Lassiter challenges the district court's entry of summary judgment on his disability discrimination claim in favor of Janet Reno, Attorney General and department head of Lassiter's former employer, the United States Marshal Service (USMS). Lassiter contends that the district court erred in concluding that he had failed to demonstrate that he was "otherwise qualified" under the Rehabilitation Act of 1973 (the Rehabilitation Act), 29 U.S.C.A. §§ 791(b), 794(a) (West Supp. 1995). Because we agree with the district court that Lassiter is unable to demonstrate that he can perform, with reasonable accommodation, the essential functions of his former position as Deputy United States Marshal, *see Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995), we affirm.

I.

Lassiter served as a deputy marshal in the USMS from 1970 until his termination in 1992 on the ground that he was medically unfit to perform his duties. In his final, written performance appraisal, Lassiter's supervisors rated him as either excellent or outstanding in the discharge of his duties.

The sequence of events that eventually led to Lassiter's termination began in late 1990. Lassiter began to suspect that his elderly neighbor, her grandson, and other, unidentified individuals were conspiring to burglarize his home. Lassiter based his suspicion on a number of occurrences, including, for example, his observation of various trucks and cars slowing down as they passed his house and his receipt of hang-up phone calls that Lassiter traced to relatives of his neighbor through his caller-identification system. Lassiter contacted several officers of the Chesterfield County Police Department (CCPD) and expressed his concerns. In one conversation, a CCPD officer warned

Lassiter that he could not shoot the burglars; Lassiter responded that if he could not, the CCPD should "[h]ave a homicide unit standing by." (J.A. at 43.) After an investigation into Lassiter's concerns, the CCPD concluded that no conspiracy existed.

Lassiter remained convinced that he was the target of a putative conspiracy. To foil the alleged burglary ring, Lassiter pretended that he was away for the Christmas holidays. When he returned from work, Lassiter parked his car away from his home and entered his house through the side door. To simulate absence, Lassiter did not turn on any lights, answer the phone, pick up his mail, wash dishes, cook food in the oven, or flush the toilets. In preparation for the intruders, Lassiter wore his firearm in its holster, donned a bullet-proof vest, placed duct tape on all the numbers on one phone except nine and one so he could call the police in the dark if required, and remained in contact with the CCPD on another phone. Lassiter notified the police dispatchers that he would be armed with a double-barrel shotgun and a .45 caliber automatic pistol, and warned them that the only way the burglars would remove his United States Marshal's arm band would be if he were dead.

To ensure he would be alert when the burglars made their move, Lassiter slept by day and remained awake all night. On the afternoon of December 23, Lassiter refused to answer his door when a CCPD officer arrived to investigate a neighbor's complaint that Lassiter was armed and threatening to kill people. Later, in the early morning hours of December 24, the CCPD responded to another telephone call from Lassiter. When the officers arrived, they found Lassiter armed with an automatic weapon, two magazine rounds, a night-vision scope, and the bullet-proof vest. After observing the unwashed dishes, the unflushed toilets, and firearms, the officers became concerned that Lassiter was heavily armed and acting in an increasingly agitated manner. The officers departed but returned after obtaining a Temporary Detention Order directing that Lassiter be committed to Charter Westbrook Hospital for psychiatric evaluation. During his approximately three-week commitment, Lassiter continued to believe the conspiracy existed and "cheeked" [1] some of the medication provided

[1]Lassiter pretended to swallow the medicine given to him, but spit it out after the hospital personnel left.

to him because he did not trust the hospital personnel assigned to care for him. Eventually, Lassiter concluded that the doctors, staff, and his roommate at the hospital, members of the CCPD, and his pharmacist, as well as his neighbors, were all involved in the conspiracy against him.

Two weeks after his discharge from Charter Westbrook, the USMS arranged to have Dr. Thomas Mathews examine Lassiter. Dr. Mathews diagnosed Lassiter as suffering from delusional (paranoid) disorder[2] and opined that while Lassiter was not precluded from general employment with the USMS, he should be deprived of his weapon and relieved of any duties that would necessitate his carrying a weapon. After officials from the USMS explained to Dr. Mathews that it would be impossible to serve as a deputy marshal without carrying a gun, Dr. Mathews recommended that Lassiter be declared medically unfit for duty.

After receiving the results of Dr. Mathews's examination, Lassiter enlisted the services of three other psychiatrists to evaluate his condition. First, Dr. Melvin Stern diagnosed Lassiter as suffering from paranoid personality disorder,[3] but opined that Lassiter was not pres-

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[2]The Diagnostic and Statistical Manual of Mental Disorders, third edition, revised (DSM-IIIR), defines delusional (paranoid) disorder as "the presence of a persistent, nonbizarre delusion that is not due to any other mental disorder." (J.A. at 197.) The persecutory type of this disorder is described as follows:

> The persecutory delusion may be simple or elaborate, and usually involves a single theme or series of connected themes, such as being conspired against, cheated, spied upon, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals. Small slights may be exaggerated and become the focus of a delusional system. In certain cases the focus of the delusion is some injustice that must be remedied by legal action . . . . and the affected person often engages in repeated attempts to obtain satisfaction by appeal to the courts and other government agencies. People with persecutory delusions are often resentful and angry, and may resort to violence against those they believe are hurting them.

(J.A. at 198.)

[3]The DSM-IIIR states that "[t]he essential feature of this disorder is a pervasive and unwarranted tendency, beginning by early adulthood and

ently dangerous and "recommend[ed] that he be allowed to return to work including having the right to bear arms in the same capacity of Deputy U.S. Marshal that he had prior to his being hospitalized." (J.A. at 58-59.) Second, Dr. Juliann Hanback also opined that Lassiter had paranoid personality disorder, but recommended that Lassiter obtain psychiatric treatment or regular psychiatric assessments before regaining the right to own and carry firearms. Third, Dr. Paul Travis recommended that Lassiter be evaluated by a specialist in paranoid disorders.

After careful consideration of the reports of the examining psychiatrists and review of the events of late 1990, officials at the USMS decided to relieve Lassiter of his duties as a deputy marshal in May 1992. In an effort to accommodate Lassiter, the USMS attempted to place Lassiter in an administrative position in which he would not have to carry a firearm. However, because the search for a vacant position within Lassiter's commuting area was fruitless, the USMS terminated Lassiter's employment.

After the USMS terminated Lassiter's employment, Lassiter consulted a fourth psychiatrist, Dr. David Daniel. Based on his examination, Dr. Daniel concluded that "Lassiter suffers from paranoid personality disorder and has a very low potential for impulsive violence." (J.A. at 72.)

After exhausting his administrative remedies,[4] Lassiter commenced

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present in a variety of contexts, to interpret the actions of people as deliberately demeaning or threatening." (J.A. at 202.)

[4]Shortly after his termination, Lassiter appealed the USMS's decision to the Merit Systems Protection Board (MSPB). Following a hearing, an MSPB administrative law judge (ALJ) held that the USMS did not discriminate against Lassiter in violation of the Rehabilitation Act. In particular, the ALJ accorded more weight to Dr. Mathews's testimony than that of Lassiter's expert witnesses, who maintained that Lassiter suffered from a paranoid personality disorder but was not delusional, because Dr. Mathews's opinion was better supported by the narrative provided by Lassiter to the experts and because Lassiter's experts had not examined Lassiter until months after his hospitalization. Additionally, the ALJ held

this action in the United States District Court for the Eastern District of Virginia against the USMS, the Attorney General, the United States Attorney for the Eastern District of Virginia, and Eduardo Gonzalez, the Director of the USMS, alleging that his termination violated the Rehabilitation Act and the Virginia Human Rights Act, Va. Code Ann. §§ 2.1-714 to -725 (Michie 1995). The district court dismissed all claims against all parties except for the Rehabilitation Act claim against the Attorney General. The district court subsequently granted summary judgment in favor of the Attorney General on the Rehabilitation Act claim, holding that Lassiter had failed to offer evidence raising a genuine issue of material fact on the issue of Lassiter's ability to perform the essential functions of his position with or without a reasonable accommodation for his disability.

Lassiter appeals only the district court's entry of summary judgment on his Rehabilitation Act claim, contending that (1) a genuine issue of material fact existed as to whether Lassiter could perform the essential functions of a deputy marshal and (2) the USMS had failed to reasonably accommodate Lassiter's disability. After briefly discussing our standard of review on summary judgment and setting forth the framework for analyzing claims under the Rehabilitation Act, we address Lassiter's arguments in turn.

II.

Rule 56(c) of the Federal Rules of Civil Procedure requires the district court to enter summary judgment against a party who, "after adequate time for discovery . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To prevail on a motion

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that Lassiter had failed to show that a reasonable accommodation for his disability existed. The MSPB affirmed the ALJ's initial ruling that Lassiter was medically unfit for his position, and the Equal Employment Opportunity Commission subsequently concurred with the MSPB's findings. Despite these administrative adjudications, Lassiter was entitled to a trial de novo on his discrimination claim in the district court. *See Chandler v. Roudebush*, 425 U.S. 840, 863 (1976).

for summary judgment, the Attorney General must "show that there is no genuine issue as to any material fact and that [she] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In evaluating the evidence, all reasonable inferences must be construed in favor of Lassiter. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted). We review Lassiter's challenge to the district court's entry of summary judgment de novo. *Harleysville Mut. Ins. Co. v. Packer*, 60 F.3d 1116, 1120 (4th Cir. 1995).

Lassiter claims that he was unlawfully discharged from his position as a deputy marshal because of his disability in violation of sections 501 and 504 of the Rehabilitation Act. *See* 29 U.S.C.A. §§ 791(b), 794(a).[5] Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program or activity . . . conducted by any Executive agency." 29 U.S.C.A. § 794(a). For Lassiter to establish a violation of section 504, he must prove: "(1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability." *Doe v. University of Md. Medical Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995).

Under the Rehabilitation Act, an individual with a disability is defined as a person who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C.A. § 706(8)(b) (West Supp. 1995). The Attorney General does not dispute that the USMS regards Lassiter as being disabled, *see Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (recognizing that even though the employee does not

[5]Because Lassiter "has consistently litigated this action as a straightforward anti-discrimination claim cognizable under section 501 or section 504," we shall treat it as such. *See Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1083 (S.D.N.Y. 1993).

believe that he is disabled, he is considered to be an individual with a disability under the Rehabilitation Act if the employer regards the employee as having a disability), nor does she contend that the USMS terminated Lassiter for a reason other than his disability. Thus, we focus our discussion on the second element of the test: Whether Lassiter was otherwise qualified under the Rehabilitation Act.

A disabled person is otherwise qualified for a position if he "can perform 'the essential functions' of the job in question." *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n.17 (1987). If the disabled individual is unable to perform the essential functions of the position, the employee's termination may nevertheless be unlawful if the employer has failed to provide a reasonable accommodation that "would enable the handicapped person to perform those functions." *Id.* Keeping this framework in mind, we now turn to Lassiter's arguments.

A.

Lassiter first contends that he offered sufficient evidence in the district court to raise a genuine issue of material fact as to whether he is otherwise qualified under the Rehabilitation Act. To be otherwise qualified, Lassiter must be able to perform the essential functions of his position without "pos[ing] a significant risk to the health or safety of others by virtue of [his] disability that cannot be eliminated by reasonable accommodation." *Doe*, 50 F.3d at 1265. In assessing whether an employee can perform his duties without a significant risk to the safety of himself or others, we must consider the nature of the position and the consequences should the employee fail to perform his duties properly. *See id.* at 1265-66 (discussing risk posed by HIV-positive surgeon); *Myers*, 50 F.3d at 282 (analyzing consequences if diabetic bus driver's blood sugar rose above the proper level); *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1086 (S.D.N.Y. 1993) (stating the necessity of evaluating "the consequences of a failure to perform and the likelihood of such a failure"). For a law enforcement officer, the failure to perform one's duties properly can result in dramatic repercussions, placing others in imminent peril. *See Butler v. Thornburgh*, 900 F.2d 871, 876 (5th Cir.), *cert. denied*, 498 U.S. 998 (1990); *Hogarth*, 833 F. Supp. at 1087. Indeed, the USMS maintains strict medical standards for the mental fitness of its deputy marshals,

requiring that they have no "history of a basic personality disorder." (J.A. at 559.)

The parties do not dispute that carrying a firearm is an essential function of a deputy marshal, whose duties require confrontation of potentially hostile situations and evaluation of whether deadly force is needed.[6] Thus, we are faced with the question of whether the evidence Lassiter offered was sufficient to raise a genuine issue as to whether he would be able to perform his duties, including carrying a firearm, without posing a significant risk to the safety of himself or others.

In support of his assertion that a genuine issue of material fact exists as to whether he poses a significant risk to the safety of others, Lassiter refers us to the reports of two of his experts, Drs. Stern and Daniel, who opine, respectively, that Lassiter should be returned to employment in the same capacity including the right to bear a firearm and that Lassiter has a low potential for impulsive violence. Additionally, Lassiter contends that the deposition testimony of Dr. Mathews, who declared Lassiter medically unfit for duty, represents further evidence of a genuine issue of material fact. In his deposition, Dr. Mathews answered in the negative when asked whether there was "a reasonable likelihood that . . . Lassiter will become violent, and therefore, should not carry a weapon." (J.A. at 533.)

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[6]The Attorney General describes the duties of a deputy marshal in the following manner:

> The duties of the DUSM position require plaintiff to investigate and apprehend several types of federal fugitives, including escapees, and bond, probation, and parole violators. In addition, DUSM's are responsible for investigating, seizing, maintaining, and disposing of drug-related assets seized pursuant to federal drug and forfeiture laws. Moreover, DUSM's provide security for judges, courtrooms, witnesses, prisoners, and juries at threat-sensitive trials, including espionage, terrorism, and drug cases. Deputy U.S. Marshals maintain custody of and transport dangerous prisoners. Finally, Deputy U.S. Marshals execute both criminal and civil federal court process.

(Appellee's Br. at 10 n.2.)

We cannot agree with Lassiter's contention. Upon reviewing the opinions of Drs. Stern and Daniel and the testimony of Dr. Mathews, it is evident that there is no genuine issue of material fact that Lassiter cannot perform his duties without posing a significant risk to the safety of himself or others. The opinions of Drs. Stern and Daniel and the testimony of Dr. Mathews show only that Lassiter has a low potential for impulsive violence, not that he does not pose a significant risk to the safety of himself or others.

Although Dr. Stern does opine that the USMS should return Lassiter to his duties, including carrying a firearm, Dr. Stern's report does not represent probative evidence raising a genuine issue of material fact because his conclusion is based not on whether Lassiter poses a significant risk to the safety of himself or others, but rather on Dr. Stern's belief that Lassiter is not "presently dangerous." (J.A. at 58.) In his report, Dr. Stern diagnosed Lassiter as suffering from paranoid personality disorder and warned that persons with this disorder are overly suspicious, "have an expectation of being exploited or harmed by others[,]" and "have a tendency to read hidden, demeaning or threatening meanings into benign remarks or events." (J.A. at 58.) Stern concluded, however, that Lassiter is not presently dangerous because persons with paranoid personality disorder are unlikely to "strik[e] out impulsively" in a violent manner. (J.A. at 58.)

Agreeing that Lassiter suffers from paranoid personality disorder, Dr. Daniel also opined that Lassiter "has a very low potential for impulsive violence." (J.A. at 72.) Similarly, however, Dr. Daniel reported that persons with paranoid personality disorder display a "pervasive and unwarranted tendency . . . to interpret the actions of people as deliberately demeaning or threatening." (J.A. at 69 (internal quotation marks omitted).) Regarding Lassiter's erratic behavior in December 1990, Dr. Daniel further opined that Lassiter's misinterpretation of the events was not a delusion, but more likely an "over-valued idea" or an "idea[ ] of reference." (J.A. at 70 (internal quotation marks omitted).) Dr. Daniel defines an over-valued idea as an "unreasonable and sustained belief or idea" and an idea of reference as an "idea[ ] . . . that events, objects, or other people in the person's immediate environment have a particular and unusual meaning specifically for him." (J.A. at 69-70 (internal quotation marks omitted).)

Dr. Mathews's admission that Lassiter was not reasonably likely to become violent similarly does not represent probative evidence of a genuine issue of material fact, because, again, the inquiry is not whether Lassiter is reasonably likely to become violent, but whether Lassiter poses a significant risk to the safety of himself or others. When asked whether Lassiter "pose[d] a reasonable probability of substantial harm[,]" a question whose phrasing resembles the issue at hand, Dr. Mathews responded unequivocally in the affirmative. (J.A. at 483.)

The opinions of Drs. Stern and Daniel and the testimony of Dr. Mathews support the conclusion that Lassiter is unlikely to strike out impulsively with violence; however, they do not contradict the overwhelming evidence in the record that Lassiter, when carrying a firearm in the course of his duties, poses a significant risk to the safety of himself and others. Given the duties of a deputy marshal, a significant risk to the safety of others can arise not only from an inclination to strike out in violence, but also from a tendency to misperceive the true nature of events. *Cf. Hogarth*, 833 F. Supp. at 1086 (noting danger posed by Federal Bureau of Investigation agent's potential misperception of reality). Placed in unfamiliar circumstances that may or may not be hostile, the deputy marshal must have the ability to decide in an instant whether the use of deadly force is warranted. If an innocent person is injured or killed because a deputy marshal "read . . . threatening meanings into benign remarks or events[,]" (J.A. at 58,) "it is not difficult to imagine the public outrage, let alone the potential liability" to which the federal government would be subjected, *Myers*, 50 F.3d at 282 (internal quotation marks omitted).

After careful consideration of the psychiatrists' evaluations and Lassiter's own account of the events of December 1990, the USMS made a reasoned, informed decision to terminate Lassiter. The sole conclusion the record supports is that public safety was the USMS's only interest when it arrived at its decision. Under these circumstances, "[w]e are reluctant . . . to substitute our judgment for that of" the USMS. *Doe*, 50 F.3d at 1266. Because Lassiter is unable to offer evidence sufficient to raise a genuine issue of material fact, we hold that the district court did not err in concluding that Lassiter is unable to perform the essential functions of his job without posing a significant risk to the health and safety of himself and others.

B.

Next, Lassiter asserts that even if he is unable to perform the essential functions of his position, his termination was unlawful because the USMS failed to reasonably accommodate his disability. *See Arline*, 480 U.S. at 287 n.17. Lassiter contends that the USMS did not satisfy its duty of reasonable accommodation because: (1) the USMS did not allow Lassiter to return to work and regain the privilege of carrying a firearm after submitting to periodic psychiatric evaluations; and (2) the USMS failed to reassign Lassiter to an administrative position in which he would not be required to carry a firearm, or, in the alternative, to place Lassiter on a leave of absence until an administrative position opened in the district.

Lassiter contends that the USMS should have reasonably accommodated his disability by allowing him to return to work and regain the right to carry a weapon after periodic psychiatric evaluations, as suggested by Dr. Hanback.[7] Lassiter's argument fails because a disabled employee must be able, with reasonable accommodation, *presently* to perform the essential functions of his job. *See Myers*, 50 F.3d at 283. The Rehabilitation Act does not envision requiring "an employer to wait an indefinite period for an accommodation to achieve its intended effect." *Id.* Thus, Lassiter's suggestion is not a reasonable accommodation under the Rehabilitation Act.

Finally, Lassiter asserts that the duty of reasonable accommodation required the USMS either to transfer Lassiter to an administrative position in which he did not have to carry a firearm, or to place Lassiter on a leave of absence until an administrative position became available. Again, the USMS is not required under the law to go to these lengths to accommodate Lassiter. As a matter of reasonable accommodation, "an employer is not required . . . to transfer or reassign an employee who is not otherwise qualified for the position he

[7]Lassiter contends that Dr. Mathews also suggested this option. However, the record reveals that although Dr. Mathews recommended that Lassiter be allowed to return to work after periodic psychiatric evaluations, Dr. Mathews never intimated that Lassiter should be allowed to carry a firearm after he returned.

then holds."[8] *Guillot v. Garrett*, 970 F.2d 1320, 1327 (4th Cir. 1992); *see also Carter v. Tisch*, 822 F.2d 465, 468 (4th Cir. 1987) ("None of the courts which have considered the EEOC regulations defining reasonable accommodation have concluded that an alternative assignment is a required accommodation."). Therefore, we conclude that the district court properly entered summary judgment in favor of the Attorney General on the issue of whether a reasonable accommodation existed that would allow Lassiter to perform the essential functions of his job.

III.

For the foregoing reasons, we affirm the decision of the district court granting summary judgment in favor of the Attorney General.

AFFIRMED

[8]Effective October 1, 1992, federal agencies are required to reassign disabled employees to suitable, funded, vacant positions located in the same commuting area provided the reassignment does not impose undue hardship on the operation of the program. *See* 29 C.F.R. § 1614.203(g) (1995). Because the USMS terminated Lassiter in May 1992, § 1614.203(g) does not apply to this controversy; however, even if it did, the record reflects that no vacant positions that qualified under the regulation existed within Lassiter's commuting area.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 26, 1996

No. 95-2058
CA-94-626

ALBERT LASSITER

Plaintiff - Appellant

v.

JANET RENO, United States Attorney General; EDUARDO GONZALEZ, Director, United States Marshal Service; HELEN F. FAHEY, United States Attorney; U.S. MARSHAL SERVICE

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALBERT LASSITER,

Plaintiff,

v. File No. 3:94CV626

JANET RENO, et al.,

Defendants.

FINAL ORDER

This matter is before the Court on the defendants' Motion to Dismiss and/or for Summary Judgment. For the reasons set forth in the accompanying Memorandum Opinion, defendants' motion is GRANTED. The Court DISMISSES plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act, Virginia Code § 2.1-715, as well as plaintiff's claims against defendants United States Marshal Service, Helen Fahey, and Eduardo Gonzalez. Further, the Court ENTERS summary judgment for the defendants on plaintiff's remaining claims under the Rehabilitation Act of 1973, as amended 29 U.S.C. § 791, et seq.

It is SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

MAY 15, 1995
DATE

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALBERT LASSITER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	File No. 3:94CV626
	)	
JANET RENO, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on the defendants' Motion to Dismiss and/or for Summary Judgment. For the reasons set forth below, the Court grants the motion.

I. Background

From January 12, 1970 until his discharge on May 1, 1992, plaintiff Albert Lassiter worked as a Deputy United States Marshal for the United States Marshal Service ("USMS") in the Richmond Division of the Eastern District of Virginia. In November 1990, plaintiff began to suspect that his elderly next-door neighbor was conspiring with several unidentified individuals to burglarize his home in Midlothian, Virginia. Plaintiff noticed, for instance, that his neighbor's daughter followed him to work one day, and that several vehicles drove slowly through his neighborhood on a daily basis. Plaintiff reported his observations to the Chesterfield County Police Department, which conduced an

investigation and concluded that no burglary conspiracy existed. Defs.' Ex. 2 at 8.

During the next month, however, plaintiff pretended to be away from home in the hopes of apprehending the burglars when they broke into his residence. Plaintiff refused to answer his telephone, turn on his lights, and flush his toilets for fear that such actions would alert someone that he was home. In particular, plaintiff armed himself with Government-issued and privately-owned weapons in order to defend himself against the burglars. Id. at 3.

On December 24, 1990, the Chesterfield County police responded to a telephone call from plaintiff to find him armed with an automatic weapon, two magazine rounds, a night-vision scope, and a bulletproof vest. The police obtained a Temporary Detention Order directing that plaintiff be committed to Charter Westbrook Hospital in Richmond, Virginia for psychiatric evaluation. After an initial court-ordered detention, plaintiff voluntarily admitted himself to the hospital, where he remained until January 17, 1991. The record indicates that during and after plaintiff's hospitalization, plaintiff continued to believe that individuals around him were conspiring against him. Id. at 10-14.

On January 30, 1991, a psychiatrist by the name of Dr. Thomas Mathews examined plaintiff and diagnosed him as suffering from a delusional paranoid personality disorder. Dr. Mathews further stated that while plaintiff was not precluded from general employment with USMS, he should be relieved of his weapon and of any duties that would necessitate his carrying a weapon. Defs.' Ex. 4 at 3. When USMS officials explained that one of the essential duties of plaintiff's position was to carry a firearm, Dr. Mathews responded plaintiff plaintiff's inability to carry a weapon

rendered him medically unfit to perform the functions of a Deputy U.S. Marshal.

On May 12, 1992, plaintiff appealed USMS' decision to the Merit Systems Protection Board ("MSPB"). Following a hearing conducted on August 6 and 19, 1992, an MSPB Administrative Judge issued an initial decision that affirmed plaintiff's removal and found that USMS did not discriminate against plaintiff in violation of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 791, et seq. Defs.' Ex. 2. In particular, the Administrative Judge accorded more weight to Dr. Mathews' testimony than that of plaintiff's expert witnesses, who maintained that plaintiff suffered from a paranoid personality disorder but was not delusional. The Administrative Judge asserted that plaintiff's experts had examined plaintiff months after his hospitalization and at any rate were "results oriented." Id. at 22-24. On December 21, 1993, the MSPB affirmed its initial ruling, and the Equal Employment Opportunity Commission later concurred with the MSPB's findings. Defs.' Exs. 3 and 8.

Plaintiff subsequently commenced this action against USMS, Attorney General Janet Reno, Helen Fahey, the United States Attorney for the Eastern District of Virginia, and Eduardo Gonzalez, the Director of USMS. Plaintiff alleges that the defendants violated sections 501 and 504 of the Rehabilitation Act and the Virginia Human Rights Act, Virginia Code § 2.1-715, by discharging plaintiff and failing to make reasonable accommodations for his disability. Plaintiff seeks the following relief: a declaratory judgment that defendants violated the above statutes and engaged in a conspiracy prohibited under 42 U.S.C. § 1985(3); reinstatement; lost wages and benefits; nominal, general, and compensatory damages; and attorneys' fees and costs.

II. Discussion

In moving to dismiss and/or for summary judgment, defendants make the following assertions: (1) that the Court lacks subject matter jurisdiction over plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act; (2) that defendants USMS, Fahey, and Gonzalez are not proper parties to this action; and (3) that defendants are entitled to summary judgment on plaintiff's remaining claims under the Rehabilitation Act. All of these arguments are valid.

A. Plaintiff's Claims Under 42 U.S.C. § 1985 and the Virginia Human Rights Act

As an initial matter, defendants state that plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act should be dismissed because the Rehabilitation Act provides exclusive subject matter jurisdiction over this action. Section 501 of the Rehabilitation Act obligates federal agencies to "provide adequate hiring, placement, and advancement opportunities for individuals with disabilities." 29 U.S.C. § 791(b). Similarly, section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

29 U.S.C. § 794(b). The procedural and substantive provisions of Titles VII and VI of the Civil Rights Act of

1964 apply to claims brought under sections 501 and 504 of the Rehabilitation Act, respectively. 29 U.S.C. § 794a(a). Plaintiff has asserted claims under both sections of the Rehabilitation Act.[1]

Defendants submit that the Rehabilitation Act provides the exclusive means of redressing claims of handicap discrimination in federal employment. See, 29 U.S.C. § 794(a); see also Brown v. General Servs. Admin., 425 U.S. 820, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976) (Title VII provides exclusive judicial remedy for claims of discrimination in federal employment). Thus, defendants contend that this Court has no subject matter jurisdiction over plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act. In responding to defendants' motion, plaintiff did not address this argument. Since plaintiff apparently does not oppose defendants' motion on these grounds, the Court dismisses plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act.

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[1] Although section 501 of the Rehabilitation Act clearly provides a private cause of action for handicap discrimination claims brought by federal employees, circuit courts have split on whether section 504 similarly provides a private cause of action against the federal government. Compare, e.g., Johnson v. United States Postal Service, 861 F.2d 1475, 1477 (10th Cir. 1988), with Morgan v. United States Postal Service, 798 F.2d 1162, 1164-65 (8th Cir. 1986). The United States Court of Appeals for the Fourth Circuit apparently has not addressed this issue. See, Little v. Federal Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993) (federal employee case brought under both sections). The Court therefore presumes that plaintiff may properly bring this action under both sections 501 and 504 of the Rehabilitation Act.

B. Plaintiff's Claims Against Defendants USMS, Fahey, and Gonzalez

Title VII provides that plaintiff may bring his employment discrimination suit under the Rehabilitation Act against "the head of the department, agency, or unit, as appropriate," in his or her official capacity. 42 U.S.C. § 2000e-16(c); see also Johnson v. Burnley, 887 F.2d 471, 475 (4th Cir. 1989); DiPompo v. West Point Military Academy, 708 F. Supp. 540, 544 (S.D.N.Y. 1989). Defendants acknowledge that plaintiff may therefore bring this action against defendant Reno, who, in her official capacity as Attorney General of the United States, has overall supervisory authority over USMS. Defendants submit, however, that plaintiff's claims against defendants USMS, Fahey, and Gonzalez should be dismissed because these defendants are not proper parties to this action. Again, plaintiff did not respond to this argument.

Although the language of § 2000e-16(c) would permit plaintiff to assert his Rehabilitation Act claims against defendant Gonzalez, the Court agrees that plaintiff may not sue more than one department or agency head in his or her official capacity. Thus, the Court grants defendants' motion on these grounds and dismisses plaintiff's claims against defendants USMS, Fahey, and Gonzalez.

C. Plaintiff's Rehabilitation Act Claims

1. Standard of Review

Defendants further contend that they are entitled to summary judgment on plaintiff's claims under the

Rehabilitation Act.[2] A moving party is entitled to summary judgment where the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994). In considering a summary judgment motion, the Court must review the facts and draw reasonable inferences in a light most favorable to the nonmoving party. Shaw, 13 F.3d at 798 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S. Ct. 2505, 2514, 91 L.Ed.2d 216 (1986)).

To demonstrate a prima facie case of disability discrimination, plaintiff must establish the following: (1) that he is a "disabled" individual; (2) that he is "otherwise qualified" for the Deputy U.S. Marshal position; and (3) that he was removed from his position as a result of his disability. Walders v. Garrett, 765 F. Supp. 303, 308 (E.D. Va. 1991), aff'd, 956 F.2d 1163 (4th Cir. 1992) (citations omitted). If plaintiff makes out a prima facie case, the burden shifts to defendants to show that there were "job related" justifications for refusing to accommodate plaintiff, and that accommodating plaintiff would impose an "undue hardship" on their operations. Id. (Citations omitted). Thus, in order to prevail on their summary judgment motion, defendants

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[2] Defendants correctly point out that this Court has jurisdiction to review MSPB final decisions under 5 U.S.C. § 7703(b)(2). In reviewing an MSPB final decision, the Court must conduct a record analysis of non-discrimination claims but evaluate any discrimination claims de novo. See, e.g., Rana v. United States, 812 F.2d 887, 888 n.1 (4th Cir. 1987). The Court notes, however, that plaintiff has not specifically requested review of the MSPB final decision in this case. At any rate, because plaintiff's discrimination claims must be assessed de novo, the Court will apply the summary judgment standard set forth in Federal Rule of Civil Procedure 56 and relevant caselaw.

must prove that there are no genuine issues of material fact, and that they are entitled to judgment as a matter of law on plaintiff's Rehabilitation Act claims.

2. Whether Plaintiff Is a "Disabled" Individual

With respect to the first prima facie criterion, the Rehabilitation Act defines a "disabled" individual as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." 29 U.S.C> S 706(B); see also, Walders, 765 F. Supp. at 309. The parties agree that plaintiff, who at the very least suffers from paranoid personality disorder, is a "disabled" individual under the Rehabilitation Act.[3]

3. Whether Plaintiff Is "Otherwise Qualified" for the Deputy U.S. Marshal Position

Defendants argue, however, that plaintiff cannot satisfy the second prima facie requirement that he be "otherwise qualified" for the Deputy U.S. Marshal position. In determining whether plaintiff is "otherwise qualified", this Court must first consider whether plaintiff can perform the "essential functions" of a Deputy U.S. Marshal. If plaintiff cannot do so, this Court must then evaluate whether any "reasonable accommodation" by defendants would enable plaintiff to perform those functions. School Bd. of Nassau

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[3] In his deposition, plaintiff denied that he was at any time mentally disabled. If this statement were true, it would divest this Court of subject matter jurisdiction altogether, since jurisdiction is premised on the Rehabilitation Act.

Cty. v. Arline, 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 1131, n.17, 94 L.Ed.2d 307 (1987) (citations omitted). Accommodations that would impose "undue financial and administrative burdens" upon USMS are not reasonable. (Id. (citations omitted).

a. Whether Plaintiff Can Perform the "Essential Functions" of a Deputy U.S. Marshal

Defendants first contend that plaintiff cannot perform the "essential functions" of the Deputy U.S. Marshal position. Defendant submit that, in light of plaintiff's medical history, permitting plaintiff to carry a firearm would pose a "reasonable probability of substantial harm." Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985). Because the duties of a Deputy U.S. Marshal include transporting prisoners, providing security for courtrooms, and seizing drug-related assets pursuant to federal drug and forfeiture laws, carrying a firearm is an "essential function" of the Deputy U.S. Marshal position. Thus, defendants argue that plaintiff's inability to carry a firearm establishes that he cannot perform an "essential function" of a Deputy U.S. Marshal. Indeed, pursuant to USMS medical qualifications, "mental instability or history of a basic personality disorder" disqualify a person for the Deputy U.S. Marshal position. Defs.' Exs. 9-10. Accordingly, defendants assert that plaintiff's paranoid personality disorder disqualifies him altogether for duty as a Deputy U.S. Marshal.

Responding to defendants' contentions, plaintiff points out that expert witnesses disagree as to whether plaintiff suffers from a delusional paranoid personality disorder or merely a paranoid personality disorder. Plaintiff therefore submits that there are genuine issues of material fact as to

whether plaintiff suffers from a "basic" personality disorder that would disqualify him for work as a Deputy U.S. Marshal.

This Court agrees with defendants, however, that arguing whether plaintiff is delusional does not raise genuine issues of material fact in this case. Even assuming plaintiff suffers only from a paranoid personality disorder, such an affliction constitutes a "basic" disorder within the meaning of USMS medical qualifications. Additionally, plaintiff's medical history establishes that permitting plaintiff to carry a firearm would pose a "reasonable probability of substantial harm" to plaintiff and to others. Thus, the Court finds that plaintiff cannot carry a firearm or otherwise perform the "essential functions" of the Deputy U.S. Marshal position.

b. Whether Defendants Could "Reasonably Accommodate" Plaintiff's Disability

Defendants further assert that they could not "reasonably accommodate" plaintiff's paranoid personality disorder. Defendants argue that, since plaintiff cannot carry a firearm in accordance with Deputy U.S. Marshal requirements, no reasonable accommodation would permit him to return to his former position. Moreover, USMS attempted to locate a vacant administrative position for plaintiff within the Eastern District of Virginia, but no such positions were available. Defendants contend that, while they were probably obligated to search for a vacant administrative position for plaintiff, they were not required to create a new position for him or locate a position outside of this District. Thus, defendants conclude that they could not "reasonably accommodate" plaintiff, and that plaintiff therefore cannot prove that he was "otherwise qualified" for the Deputy U.S. Marshal position.

In response, plaintiff first alleges that defendants could have "reasonably accommodated" plaintiff's disability by permitting him to work in his former position with repeated follow-up psychiatric treatment. In proposing this alternative, plaintiff refers to Dr. Mathews' testimony that plaintiff could return to general work at USMS while undergoing treatment. Plaintiff further suggests that defendants could have reassigned plaintiff to a vacant administrative position outside of this District, since USMS attempted to locate such a position but later abandoned its search.

This Court agrees that defendants could not "reasonably accommodate" plaintiff's paranoid personality disorder. Although Dr. Mathews did suggest that plaintiff could return to general employment at USMS with ongoing counseling, he never testified that plaintiff could resume his former position and carry a firearm with such follow-up treatment. Defs. Ex. 8 at 14. Thus, permitting plaintiff to work as a Deputy U.S. Marshal while undergoing treatment would not be a reasonable accommodation of plaintiff's disability. In addition, defendants' unsuccessful endeavor to reassign plaintiff to an administrative position within this District satisfied the Rehabilitation Act's mandate that they attempt to accommodate plaintiff. See Guillot v. Garrett, 970 F.2d 1320, 1326-27 (4th Cir. 1992); Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987). Accordingly, it is immaterial whether defendants could have found plaintiff a position outside of this District.

The Court thus finds that plaintiff was not "otherwise qualified" for the Deputy U.S. Marshal position. Because plaintiff therefore cannot demonstrate a prima facie case of disability discrimination, defendants are entitled to judgment as a matter of law on plaintiff's Rehabilitation Act claims.

Accordingly, the Court grants defendants' motion and enters summary judgment for the defendants on these claims.

III. Conclusion

For the foregoing reasons, the Court sustains defendants' motion to dismiss and/or for summary judgment. The Court dismisses plaintiff's claims under 42 U.S.C. § 1985 and the Virginia Human Rights Act, as well as plaintiff's claims against defendants USMS, Fahey, and Gonzalez. In addition, the Court enters summary judgment in favor of defendant Reno on plaintiff's claims under the Rehabilitation Act.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

May 15 1995
DATE

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

EXCERPTS FROM
Notes of Dene James of
Conversation with Dr. Mathews

1. Let him work with treatment (ongoing),
2. Allow him to work with periodic random treatment.

Dr. Mathews recommends #1

3. Repeated examination is to ensure that the delusional disorder does not reoccur.

PPD (paranoid personality disorder) will not cause trouble to agency - except make him a pain in the "Butt" Suspicious / questioning

EXCERPT FROM
REPORT OF DR. MELVIN J. STERN, M.D.
DATED JULY 16, 1991

During my psychiatric examination of Mr. Lassiter, I saw no evidence that he was suffering from an affective or thought disorder. That is, he showed no evidence for depression or mania; he was not delusional; nor did he have a speech disorder characterized by loosening of associations, flight of ideas or tangentiality. He was cooperative throughout our sessions and provided all the information requested.

During his twenty years of service as a U.S. Marshal, he has never been reprimanded for demonstrating loss of control or any semblance of dangerousness to others. I do not believe that he is presently dangerous and therefore recommend that he be allowed to return to work including having the right to bear arms in the same capacity of Deputy U.S. Marshal that he had prior to his being hospitalized in December, 1990.

EXCERPTS FROM
MELVIN J. STERN, M.D. OCTOBER 9, 1991
LETTER TO KENNETH C. HOLECKO

In reading the USMS Medical Standard definition of mental disorders which you provided for me, my opinion is that Mr. Lassiter is suffering from a personality disorder, but I am not clear what is meant by "basic". In DSM III-R of the American Psychiatric Association, there is no criteria of "Basic" Personality Disorder. Many people suffer from personality related problems who function successfully at work, nut may have trouble with intimacy, family relationships, etc. Diagnoses such as Compulsive, Passive-Aggressive, Dependent, Avoidant and Paranoid Personality might well apply to a good percentage of any large office's work force.

My understanding of Mr. Lassiter is that he can function as a Deputy U.S. Marshal and that his twenty years of service in this capacity attest to this. He does have a Paranoid Personality Disorder, but I do not believe that this diagnosis is basic in terms of preventing him from performing his job satisfactorily.

EXCERPT FROM
JULIANN WAGNER HANBACK, Ph.D.
OCTOBER 22, 1991 LETTER TO
KENNETH HOLECKO

I regret that I am at a loss to answer your question, since your standards do not define what a "basic" personality disorder is. As Dr. Stern wrote in his letter of October 9 to you, most people do have some degree of personality disorder.

EXCERPT FROM
JULIANN WAGNER HANBACK, Ph.D.
PSYCHOLOGICAL EVALUATION OF
ALBERT LASSITER

Summary and Recommendations

Mr. Lassiter is a 45-year old man of average intelligence who has a paranoid character disorder. The testing gave no evidence of any thought disorder or psychotic process. From the testing, he does not appear to be impulsive or given to acting out. Another predictor of his potential for violence or physically harming someone that should be considered is whether he has a history of such behavior.

EXCERPTS FROM AUGUST 5, 1992 REPORT OF DAVID G. DANIEL, M.D.

The preponderance of historical, cross-sectional and expert opinion evidence in this case support the view that Mr. Lassiter suffers from a paranoid personality disorder and has a very low potential for impulsive violence. Notably, the psychological examiner who felt that Mr. Lassiter had paranoid schizophrenia and a high potential for impulsive violence did not adequately support his statements with specific evidence from the testing or interview. By default, these conclusions must be considered impressionistic and subjective.

Commonly cited predictors of violence include past history of committing violence, history of being the object of violent abuse as a child, detailed and well-planned threats of violence, history of other impulsive behaviors, drug or alcohol abuse, anti-social personality disorder, and organic mental disorders. Mr. Lassiter lacks all of these characteristics. Most importantly, over numerous years of carrying a firearm, he has never harmed another individual and has generally received above average performance ratings. Again, the single most important predictor of future violence is past violence.

EXCERPTS FROM
TESTIMONY OF DR. THOMAS A. MATHEWS, M.D.
8-19-92 BEFORE HON. H. MANLEY COSE, JUDGE

You said in your testimony that there is a potential for violence. What we have to do is measure risk. In your research, in DSM III-R; in the DSM III that preceded it; in all the psychiatric literature that you reviewed as a medical student, as an intern, and as a resident; in your 40 or more years of psychiatric practice, I would like to know what textbooks you're relying upon when you say in your direct testimony that you believe there is a reasonable likelihood that Mr. Lassiter will be violent, and therefore, should not carry a gun?

A. I don't believe I used the word likelihood. I only used the word there is the potential.

Q. No, sir. You used reasonable probability or reasonable likelihood. If necessary, we can have it read back. But I don't want to stop here on the basis of a statement you may have made during direct examination.

Do you believe there is a reasonable likelihood that Mr. Lassiter will become violent, and therefore, should not carry a weapon?

A. If you ask me "likely", the answer is no; "possibly", the answer is yes.

EXCERPT FROM DEPOSITION OF ROGER RAY

A I know that I was talked to, whether by Joe Holecko, I'm not really sure, but I know that they talked to me about a position for Al in Eastern Virginia, which I had no problem in giving him a position in Eastern Virginia

EXCERPT FROM
UNDATED MEMO FROM GARY E. MEAD TO
ALBERT LASSITER

Offer of Reassignment to an Administrative Position

Review of your Application for Federal Employment (SF-171) dated August 27, 1991, revealed that you are qualified for the two Property Management Specialist positions you identified (92-09-EE and 92-09-CC).

I maintain that you are not medically qualified to perform the full range of Deputy United States Marshal duties and therefore can not continue to work in a law enforcement position. However, I am willing to accommodate you by placing you into an administrative position for which you are qualified.

EXCERPTS FROM
MANAGERS
&
SUPERVISORS
HANDBOOK
1990
(U.S. Department of Justice
United States Marshals Service)

SECTION 12: **HANDICAP HIRING PROGRAM**

A. **General**

This program is designed to assist the qualified handicapped (i.e., the physically impaired, the mentally retarded, and the mentally restored) in obtaining and retaining employment consistent with their level of skills and abilities, and their capacity for safe and efficient job performance.

D. **Mentally Restored**

A mentally restored person is one who has experienced some mental or emotional difficulty, has received professional treatment either in or outside of an institution, and has been judged by competent medical authority is ready to return to his/her normal activities, including employment. A mentally restored person may be appointed under a 700 hour trial appointment.

SECTION 3: **VOLUNTARY REASSIGNMENTS**

A. **General**

The purpose of this Section is to describe the procedures used to advertise and select employees under what is commonly known as the 222 Program.

The 222 Program got its name from Section 222 of the old U.S. Marshals Manual, which described the process used to voluntarily request reassignment to a different office.

B. **Coverage**

The Career Mobility Program (222 Program) is limited to Deputy U.S. Marshals and Criminal Investigators who have completed two or more years of service with the USMS.

L. **Leave Without Pay (LWOP)**

Leave without pay (LWOP) is an approved absence without pay requested by an employee.

SECTION 11: EMPLOYEE ASSISTANCE PROGRAMS

A. **General**

The USMS, as an employer, is concerned with the health and general welfare of its employees and recognizes that virtually all behavioral and personal problems can be successfully dealt with and resolved provided they are identified at an early stage and referral is made to an appropriate form of care. This applies to medical-behavioral problems including: alcohol abuse, alcoholism, drug abuse, generic mental health problems, marital and family distress, job stress, as well as financial, legal and other problems which result in significantly impaired job performance. It is the policy of the USMS to assist its employees in the satisfactory performance of their jobs and to recognize, reduce and/or eliminate elements in the work environment which impede or impair satisfactory performance of their jobs. Employees having behavioral problems, including

alcoholism and drug abuse, will be afforded the same careful consideration and offer of assistance that is extended to employees having any other illness or health problem.

EXCERPTS FROM FEDERAL PERSONNEL MANUAL

CHAPTER 339. MEDICAL QUALIFICATION DETERMINATIONS

4.3 REASONABLE ACCOMMODATION

Pursuant to the Rehabilitation Act of 1973, as amended, EEOC has issued regulations requiring agencies to make reasonable accommodation to the known physical or mental limitations of qualified handicapped applicants or employees (i.e., persons who, with or without reasonable accommodation, can perform the essential functions of a position without endangering the health and safety of the individual or others), unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Reasonable accommodation may include, but shall not be limited to, making facilities accessible to and usable by handicapped persons, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, provision of readers and interpreters and other similar actions. Under the terms of the decision by the Special Panel in *Ignacio v. U.S.P.S.*, 30 M.S.P.R. 471 (1986), agencies are also required to consider reassignment as one method of according reasonable accommodation to a qualified handicapped employee. The factors to consider in determining whether an accommodation is an undue hardship are found at 29 CFR 1613.704(c).

APPENDIX A: Qualifications Guidelines for Special Medical Conditions

In general, the existence of a medical condition or impairment, or a history of such a condition, is disqualifying only when there is a direct relationship between the condition and the essential duties of the specific position to be filled. In other words, the fact that an individual had or has a medical condition which might become worse is not enough, by itself, to support disqualification. The agency must establish either a link between the condition and inability to perform, or a high probability of hazard because of the nature of the duties, should the person be placed in the position. In this connection, the courts have held that in determining the employability of an otherwise qualified person with a handicap, the employer must conduct a particularized inquiry into the person's work and medical history. (See, for example, *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

If an applicant or employee is an individual with a handicap within the meaning of the Rehabilitation Act, before determining that a medical condition is disqualifying, the agency must consider whether the individual can perform the essential functions of the job safely and efficiently with reasonable accommodation.

EXCERPTS FROM
AFFIRMATIVE ACTION PROGRAM PLAN UPDATE
AND REPORT OF ACCOMPLISHMENTS

Plan update for the period October 1, 1991, through September 30, 1992

U.S. Marshals Service
NAME OF ORGANIZATION

D. Policy Statement

The United States Marshals Service (USMS) is an equal employment opportunity agency, and is committed to fully supporting the employment of Persons with Disabilities in Headquarters and in the Field components. The objective of the program is to develop and enhance employment opportunities for individuals with handicaps.

SYSTEMATIC ANALYSIS

The USMS will continue to examine our procedural and administrative processes to determine whether or not these processes have the effect of excluding individuals with handicaps without giving them the opportunity to be considered on the basis of their individual qualifications (with any necessary reasonable accommodations) to perform in the specific position for which they are applying or in one of the positions in a particular occupational series when a number of vacancies are filled under one announcement.

EXCERPTS OF AUGUST 27, 1991 LETTER FROM PAUL TRAVIS, M.D. TO MR. BROIDA

In summary, Mr. Lassiter was diagnosed as paranoid Schizophrenic by the psychologist at Westbrook, however no evidence of a Paranoid Schizophrenic Disorder was found by any of the other examiners including the undersigned. The longstanding history is indicative of a personality disorder yet it has not impaired his abilities to perform his duties as an D.U.S.M. and he has never used deadly force.

DENE JAMES' HANDWRITTEN RESEARCH NOTE

Reasonable Accomodation
Community Area
National Agency Wide
Department Wide

EXCERPTS FROM JANUARY 21, 1991 LETTER FROM MITCHELL DUNN, M.D. TO LASSITER

The results from the periodic medical examination which Lassiter underwent on November 1, 1990 noted a history of stress related problems, nasal polyps, back problems. All examination components not specifically commented upon were essentially normal.

EXCERPTS OF DEPOSITION OF
KENNETH HOLECKO
TAKEN MARCH 21, 1995

At the time that we were dealing with Mr. Lassiter's case, the Service really did not evolve to the point where it has today, where we will routinely consider an accommodation for an individual, who is in a law enforcement job, who becomes medically disqualified. And what was happening during this case is, that we were attempting to better ascertain what our legal obligations were, and we were evolving an administrative process for doing that.

Because as I testified earlier, depending on what a person has actually done in his law enforcement career, he may qualify for administrative positions even though the law enforcement duties, you know, themselves, typically, don't qualify you for administrative functions.

We did talk about the possibility accommodating him through a reassignment to one of our seized asset regional offices, which would have been either in Houston or Atlanta. We talked about a couple of jobs in Alexandria, one of which was the Security Specialist job that was in this letter, and that was stricken through, and I thought the other one was some kind of a Property Management position in Alexandria. I don't recall the Administrative Services Specialist job.

EXCERPTS FROM MEMORANDUM
FROM MULHERN, CHIEF ELRB
RE LASSITER

1. Return him to work with regular psychiatric counseling.

2. Return him to work and make him submit to random unannounced psychiatric examinations

3. Send him to another Doctor for review.

EXCERPTS FROM USMS CASE STATUS ENTRY FORM DATED OCTOBER 21, 1991

USMS asked Dr. Mathews to comment on Broida's Dr.'s evaluations. Mathews stated that Lassiter may not be suffering from the delusions he was suffering from in Nov./Dec. 1990. He could accept Stern, Hanback and Travis' evaluation.

EXCERPTS FROM MARCH 21, 1995 DEPOSITION OF GARY E. MEAD

There would be no need to go through the Civil Service process, and it's my understanding they would be offered the position, they would not necessarily be put into it against their will.

EXCERPTS FROM AGENCY MEMORANDUM FROM HOLECKO RE LASSITER

After another review of the statutory language for the Rehabilitation Act, we found that we have no duty to accommodate handicaps outside the commuting area under EEOC's new regs. I think we now have agreement to remove Lassiter. Please prepare a decision asap. Try to explain the gyrations as bet you can.

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

(2)

No. 96-660

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALBERT L. LASSITER, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner, who has a paranoid personality disorder, is not qualified to work as an armed law enforcement officer because his employment poses a significant risk to the safety of himself or others.

2. Whether the court of appeals correctly affirmed the district court's determination that the United States Marshals Service could not reasonably accommodate petitioner's disability, where the Marshals Service attempted to reassign petitioner, and its attempt predated any statutory obligation to accommodate employees with disabilities through appropriate reassignment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 86 F.3d 1151 (Table). The opinion of the district court (Pet. App. 17a-28a) is reported at 885 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1996. A petition for rehearing was denied on July 26, 1996. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on October 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 1, 1992, the United States Marshals Service terminated petitioner Alfred Lassiter's employment as a United States deputy marshal, after considering reports by four psychiatrists who diagnosed petitioner as suffering from a delusional (paranoid) personality disorder or paranoid personality disorder. Pet. App. 4a-5a, 17a. Deputy marshals investigate and apprehend fugitives from justice, seize and dispose of assets under forfeiture laws, provide courtroom security, execute civil and criminal court process, and transport prisoners. *Id.* at 9a n.6. Because of the risk of hostile and dangerous situations, deputy marshals carry firearms. *Id.* at 9a.

In late 1990 petitioner began to suspect that his elderly neighbor and other, unidentified persons were conspiring to burglarize his home. Pet. App. 2a. The Chesterfield County Police Department conducted an investigation and concluded that no such conspiracy existed. *Id.* at 3a. Nonetheless, petitioner remained convinced that he was the target of a burglary conspiracy and devised a plan to thwart the burglars. To convince the burglars that he had left home for the Christmas holidays, he parked his car away from his house and concealed his presence in the house by refusing to answer the telephone, turn on the lights, pick up mail, wash dishes, cook food, or flush the toilets. Arming himself with both government-issued and privately-owned weapons and wearing a bullet-proof vest, *id.* at 18a, he awaited the burglars, sleeping by day and staying awake at night, *id.* at 3a. He stayed in contact with the police, telling dispatchers that he was armed with a double-barreled shotgun and a .45 caliber automatic pistol. He announced that the

burglars would be able to take his United States Marshals' armband from him only if he were dead. *Ibid.*

On December 23 a neighbor complained to the police that petitioner was armed and threatening to kill people. Pet. App. 3a. When police came to investigate, petitioner refused to open his door. In the early hours of December 24, police responded to a telephone call from petitioner himself and found him wearing the bullet-proof vest and armed with an automatic weapon, two magazine rounds, and a night-vision scope. *Ibid.* After noticing the unwashed dishes, the unflushed toilets, the firearms, and petitioner's agitation, the police secured a temporary detention order to have petitioner committed for psychiatric evaluation. *Ibid.*

Petitioner then voluntarily admitted himself to Charter Westbrook Hospital. Pet. App. 18a. During his stay, he became persuaded that the doctors, the staff, his hospital roommate, members of the police department, his pharmacist, and his neighbors were all involved in a conspiracy against him. *Id.* at 4a.

At the request of the United States Marshals Service, Dr. Thomas Mathews examined petitioner shortly after his hospital stay. Pet. App. 4a. Dr. Mathews diagnosed petitioner's condition as a delusional (paranoid) personality disorder. Persons suffering from this disorder have persecutory delusions, "are often resentful and angry, and may resort to violence against those they believe are hurting them." *Id.* at 4a n.2 (quoting the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1987) (DSM-IIIR)). Dr. Mathews recommended that petitioner be relieved of his firearm and of any duties that might require him to be armed. When the Marshals Service responded that it

would be impossible for petitioner to serve as a deputy marshal without carrying a gun, Dr. Mathews recommended that petitioner be declared medically unfit for duty. *Id.* at 4a.

Petitioner then consulted three psychiatrists. Dr. Stern and Dr. Hanback diagnosed him with paranoid personality disorder. Pet. App. 4a-5a. "[T]he essential feature of this disorder is a pervasive and unwarranted tendency * * * to interpret the actions of people as deliberately demeaning or threatening." *Id.* at 4a-5a n.3 (quoting DSM-IIIR). Both Dr. Stern and Dr. Hanback recommended that petitioner be permitted to return to work, although Dr. Hanback suggested that petitioner obtain psychiatric treatment before regaining the right to carry a firearm. *Id.* at 4a-5a. Dr. Travis suggested that petitioner be evaluated by a specialist in paranoid disorders. *Id.* at 5a.

After considering the doctors' evaluations, the Marshals Service decided that petitioner no longer could serve as a deputy marshal. Pet. App. 5a. In May 1992, after trying unsuccessfully to find a nearby position for petitioner that did not involve carrying a firearm, the Marshals Service terminated petitioner's employment. *Ibid.* Petitioner then consulted a fourth psychiatrist, who also diagnosed his condition as paranoid personality disorder. *Ibid.*

Petitioner sought administrative relief, alleging disability discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.* Both the Merit Systems Protection Board and the Equal Employment Opportunity Commission concluded that the Marshals Service did not discriminate against petitioner. Pet. App. 5a-6a n.4. Petitioner then filed suit, again alleging, among other things, that his termi-

nation violated the Rehabilitation Act.* The district court granted summary judgment against petitioner. *Id.* at 17a-28a. It concluded that he had not demonstrated a prima facie case of discrimination because he had not raised a genuine issue of material fact about his inability to perform the essential job function of carrying a firearm, either with or without a reasonable accommodation. *Id.* at 26a-27a.

The court of appeals affirmed. Pet. App. 1a-13a. The court found no evidence to contradict "the overwhelming evidence in the record that [petitioner], when carrying a firearm in the course of his duties, poses a significant risk to the safety of himself and others." *Id.* at 11a. Citing expert testimony that a person with a paranoid personality disorder is likely to "read * * * threatening meanings into benign remarks or events," the court concluded that, "[g]iven the duties of a deputy marshal, a significant risk to the safety of others can arise * * * from a tendency to misperceive the true nature of events." *Ibid.* The court of appeals also affirmed the district court's holding that there is no reasonable accommodation for petitioner's disability available to the Marshals Service. *Id.* at 12a-13a.

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* Petitioner sued the United States Marshals Service; its director, Eduardo Gonzalez; Attorney General Janet Reno; and Helen Fahey, the United States Attorney for the Eastern District of Virginia. Pet. App. 19a. The district court held that only Attorney General Reno was a proper party to the action. *Id.* at 22a. The court dismissed petitioner's claims against the other defendants, *ibid.*, and petitioner did not appeal the order of dismissal, *id.* at 6a.

ARGUMENT

The decision of the court of appeals is correct in all respects. Its conclusion that petitioner is not otherwise qualified to perform the essential functions of a deputy marshal is correct under *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), and does not conflict with any decision of this Court or another court of appeals. A federal employer's obligation to accommodate employees with disabilities through appropriate reassignments has been determined by Congress and requires no further elaboration by this Court.

1. The Rehabilitation Act of 1973 prohibits a federal employer from discriminating against an "otherwise qualified" employee solely on the basis of his disability. 29 U.S.C. 794. This Court's decision in *Arline* sets forth the applicable legal standard for determining when serious health and safety risks created by an employee's disability render that employee not "otherwise qualified" for his or her employment, and the lower federal courts have applied that standard in a consistent manner.

Arline involved an elementary school teacher whose disability—tuberculosis—presented a potential risk to the health and safety of others, including her students. 480 U.S. at 275. Observing that employers must "avoid[] exposing others to significant health and safety risks," *id.* at 287, this Court held that "[a] person who poses a significant risk * * * to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk," *id.* at 287 n.16. To determine whether such a risk is significant, courts are to look not only to the probability of harm, but also to the

nature, duration, and severity of the potential harm. *Id.* at 288.

The lower federal courts have uniformly applied *Arline*'s holding that an employee is not "otherwise qualified" when his or her disability creates a "significant risk" to health or safety. See, *e.g.*, *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1265-1267 (4th Cir. 1995) (HIV-positive surgeon was not "otherwise qualified" because he posed a significant risk of harm to his patients); *Chiari* v. *City of League City*, 920 F.2d 311, 316 (5th Cir. 1991) ("[C]ourts * * * unanimously have held that a handicapped individual cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."); *Scoles* v. *Mercy Health Corp. of Southeastern Pennsylvania*, 887 F. Supp. 765, 770-771 (E.D. Pa. 1994) (HIV-positive orthopedic surgeon not "otherwise qualified"); *Mauro* v. *Borgess Medical Ctr.*, 886 F. Supp. 1349, 1352-1354 (W.D. Mich. 1995) (HIV-positive surgical technician not "otherwise qualified"); cf. *Altman* v. *New York City Health & Hosps. Corp.*, 903 F. Supp. 503, 508-514 (S.D.N.Y. 1995) (doctor's alcoholism rendered him unqualified because of the significant risk to patients), aff'd, No. 95-9053, 1996 WL 670611 (2d Cir. Nov. 21, 1996). Applying *Arline*, the court of appeals in this case correctly inquired "whether [petitioner] poses a significant risk to the safety of himself or others." Pet. App. 11a. The court then correctly concluded that he did.

Petitioner argues (Pet. 12-14) that the court of appeals' decision is in direct conflict with *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985). In that Rehabilitation Act case, the Ninth Circuit directed an inquiry into whether an employee with a disability

posed "a reasonable probability of substantial harm" to himself or others. *Id.* at 1424. *Mantolete*, however, preceded *Arline*. The Ninth Circuit now applies *Arline*'s "significant risk" standard in a manner consistent with the other lower federal courts. See, *e.g.*, *Chalk* v. *United States Dist. Court*, 840 F.2d 701, 705-706 (1988).

Petitioner further argues (Pet. 13) that he is qualified to work as a deputy marshal because the possibility that he might injure somebody while on armed duty is "not only * * * improbable, but practically non-existent." The evidence, however, is to the contrary. All five psychiatrists who examined petitioner diagnosed him as suffering from, at the very least, a paranoid personality disorder that predisposed him to interpret benign events as hostile. Accordingly, the court of appeals concluded that, because a "deputy marshal must have the ability to decide in an instant whether the use of deadly force is warranted," petitioner's inability to distinguish benign events from threatening ones rendered him unqualified for service as an armed deputy marshal. Pet. App. 11a.

That conclusion is correct under *Arline*, which holds that a risk of serious injury or death may be "significant" even if the probability of its occurrence is low. See 480 U.S. at 288; *Bradley* v. *University of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) ("While the risk is small, it is not so low as to nullify the catastrophic consequences of an accident."), cert. denied, 510 U.S. 1119 (1994); *Scoles*, 887 F. Supp. at 769 ("*Arline* directs the court to weigh the duration and severity of the risk."); *Mauro*, 886 F. Supp. at 1353 ("The evidence that the probability of transmission is very small * * * does not alter

the facts that transmission is possible and invariably lethal."). Here, the lower courts agreed that the risk of harm was significant, if not substantial. See Pet. App. 26a (district court concluded that allowing petitioner to carry a firearm "would pose a 'reasonable probability of substantial harm' to [himself] and to others"); *id.* at 11a (court of appeals citing "overwhelming evidence" that petitioner, "when carrying a firearm in the course of his duties, poses a significant risk to the safety of himself and others"). Because the lower courts correctly analyzed the evidence under this Court's *Arline* standard, further review of this factual determination about the risks involved in this case is not warranted.

2. Petitioner asks this Court (Pet. 15) to determine whether a federal employer's duty under the Rehabilitation Act to make a reasonable accommodation "includes job reassignment where appropriate." Congress, however, has already made that determination. Its 1992 amendment to the Rehabilitation Act, together with implementing regulations, imposes upon federal employers a new duty to accommodate their employees' disabilities through appropriate reassignment. See 29 U.S.C. 794(d) (incorporating the standards applied under Title I of the Americans with Disabilities Act of 1990 (ADA) to Rehabilitation Act disability discrimination claims); 42 U.S.C. 12111(9)(B) (under the ADA, an employer's "reasonable accommodation" "may include * * * reassignment to a vacant position"); 29 C.F.R. 1614.203(g) ("[A]n agency shall offer to reassign [an] individual [with disabilities] to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level."). Accordingly, the existence or na-

ture of a federal employer's obligation to reassign employees with disabilities is not a matter of continuing concern requiring this Court's attention.

Moreover, the court of appeals correctly concluded that a federal employer's duty to accommodate an employee through an appropriate reassignment is not implicated by this case. Pet. App. 13a n.8. First, the 1992 amendment did not become effective until nearly six months after the Marshals Service terminated petitioner. *Ibid.* See *Shiring* v. *Runyon*, 90 F.3d 827, 831-832 (3d Cir. 1996) (noting that, "[a]lthough reassignment was an option under the 1990 Americans with Disabilities Act," before the 1992 amendment "it was not required of federal employers under the Rehabilitation Act"). Second, the court of appeals concluded that, even if the new provisions did apply to this controversy, the Marshals Service discharged its duty under those provisions because no vacant, funded position existed within petitioner's commuting area. Pet. App. 13a n.8; see *id.* at 26a (district court finding that the Marshals Service attempted and failed to locate a vacant position within the Eastern District of Virginia that did not require carrying a firearm). This Court's review of that factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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